No. 22348

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DANIEL D. SULLIVAN,
JO ANN SULLIVAN,

Appellants,

vs.

E. W. MULLINS, JOHN K. SLOAN
and RICHARD L. OLIVER, dba
MULLINS, SLOANE & OLIVER CO.,

Appellees.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

OPENING BRIEF OF APPELLANTS

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TOPICAL INDEX

TABLE OF AUTHORITIES

Statutes

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The within cases began with Creditor's Petitions alleging Acts of Bankruptcy filed in the United States District Court For The Central District Of California by the Appellees against the Appellants. (Page 2 of Transmitted Record.)

Section 2 a(1) of the Bankruptcy Act vests the Courts of Bankruptcy with jurisdiction to adjudge persons bankrupt:

(1) "Who have their principal place of business, resided or had their domicile within their respective territorial jurisdictions for the preceding six months . . ."

Bankruptcy Act Section 1 (10) "Courts of Bankruptcy shall include the United States Courts . . ."

STATEMENT OF THE CASE

Appellants rented a store under a written lease for the purpose of operating a laundromat from the appellees as landlords, said appellees being a partnership.

The particular question involved is whether the acts of the appellees in taking possession of the leasehold premises, resulted in a termination of the lease contract and the tenancy.

The further question is whether the appellees had the right to make an election of remedies more than once.

The eviction becomes important for the reason that it determines the amount of rent owed, and if it be true that only $253.09 in rent was owed, the Bankruptcy Court would not have jurisdiction to declare appellants' bankrupt.

I

THE APPELLEES AS LANDLORDS MADE AN ELECTION OF REMEDIES IN TAKING POSSESSION

When appellees took possession of the demised premises by changing the locks on August 9th, 1966, or August 19, 1966, this was an eviction of the appellants as lessees (Rep. Tr. pp. 11,

14-19).

As a matter of common sense, only the appellees would benefit by excluding the appellants from the premises, and then the appellees as lessors, did take over the possession and control of the property. Thereby enabling appellees to rent to another tenant. No one else would benefit by such action, and it is not encumbent upon the appellants to prove beyond a reasonable doubt, that either the lessor or those acting under them changed the locks on the laundromat machines so as to exclude appellants from the beneficial use of the premises.

The law is very clear that any eviction, constructive or otherwise, terminates the lease, and we must give the necessary weight to our underlining of Civil Code §3308, "by reason of any breach thereof, by the lessee." Unless the breach was by the lessee, the lessor does not have all the rights, remedies and options that appellees here contend that they have. Nor do they have those rights by simply ignoring the fact that someone acting for or on behalf of the lessor, the appellees herein, did effectually evict the appellants from the premises on August 9, 1966, or on August 19, 1966. The law is clearly stated in the case of Sierad v. Lilly (1962), 204 Cal. App. 2d 770 where the Court held:

> "Any disturbance of a tenant's possession by a landlord or one acting under his authority, whereby the premises are rendered unfit for

occupancy for the purpose for which they are demised, or the tenant is deprived of the beneficial enjoyment of the premises, amounts to a constructive eviction."

The only proper action to be taken by the appellants upon their eviction on August 9, 1966, was to abandon the premises, to order the utilities cut off, and at least the appellants knew that they were on the outside looking in, (Rep. Tr. pp. 43 and 54).

The tenants had no other choice but to abandon the premises as was held in Sanders v. Allen (1948), 83 Cal. App. 2d 362, where the Court said:

"Except in the case of a partial eviction, the tenant must then abandon the premises within a reasonable time, if he wishes to terminate the liability."

In the within cause, the appellants did desire to terminate the liability under the lease, and as a result of the actions of the landlord, or those acting for him, they were then forced to abandon the premises, whereupon the lease was terminated.

Only the appellee as the landlord herein, would benefit by the changing of the locks upon the machines of the laundromat, and therefore we can only conclude that the act was done by the landlord, or for their benefit by their agents or representatives.

The above reasoning is clearly set forth in the case of Groh v. Kover's Bull Pen Inn (1963), 221 Cal. App. 2d 611

wherein the Court held:

> "A constructive eviction occurs when the acts or omissions to act of the landlord, or any disturbance or interference by the landlord, renders the premises, or a substantial portion thereof, unfit for the purposes for which they were leased, or which has the effect of depriving the tenant for a substantial period of time of the beneficial enjoyment of use of the premises."

Appellee places great stress upon Calif. Civil Code §3308 (added in 1937). A careful reading and analysis of that section clearly illustrates why appellees claim in this action for involuntary bankruptcy is invalid. Civil Code §3308 provides as follows:

> "The parties to any lease of real or personal property may agree therein that if such lease shall be terminated by the lessor by reason of any breach thereof by the lessee, the lessor shall thereupon be entitled to recover from the lessee the worth at the time of such termination, of the excess, if any, of the amount of rent and charges equivalent to rent reserved in the lease for the balance of the stated term, or any shorter period of time over the then reasonable rental value of the premises for the same period."

Clearly the acts of the appellants in this case comes under the holding in Standard Livestock v. Pentz (1928), 204 Cal. 618, 269 Pac. 645 wherein the Court held:

"Eviction, actual or constructive, constitutes breach of the covenant of quiet enjoyment."

California Civil Code §1927.

Further to avoid a technical surrender the lease must provide that the lessor may re-rent for the lessee after notice of such intent or with notice waived. In this case the lessors did not give any notice, but merely stated in a letter prior to any action being taken that landlord intended to exercise some of their rights of some remedies under paragraph 21 of the lease (Rep. Tr. p. 34).

It is appellants' position that the landlord did not clearly set forth in writing what remedies were to be exercised under any of the provisions of the lease. The eviction was an election. Having made an election of remedies, if there is any change in position, the tenant should have been notified by the landlord. The following cases outline the law applicable under these circumstances in which a landlord is attempting to accelerate the payment of rent and to take upon himself rights which he is not legally entitled to.

In the case of Ricker v. Rombaugh (1953), 120 Cal. App. 2d Supp. 912 the Court held:

"Provisions for acceleration of rent for the balance

of the term are unenforceable penalties."

In Jack v. Sinsheimer (1899), 5 Cal. 563, 58 Pac. 130, the Court held:

"Liquidated damages provisions have been held unenforceable on the ground there is acertainable actual damages."

The Ricker v. Rombaugh case, supra, further held:

"In the case of rent, an acceleration would require the tenant to pay for that which he has not received. Hence the provision in a lease for acceleration of rent on breach of the covenant to pay rent is void and unenforceable as being either an agreement for liquidated damages when the damages are readily ascertainable or constituting a provision for penalty. This is particularly true in a case where the lease contains a provision that the rent acceleration is in addition to any other remedy the lessor may have."

The attempt of the appellees here to accelerate their action for rent comes clearly within the holding in Tillson v. Peters (1953), 41 Cal. 2d 671, where the Court held:

"The right of action for rent accrued when each installment of rent becomes due. Hence the statute of limitations starts running against it at that time."

The lessors having failed to come properly within the provisions of the lease in this case, we must be governed by the holdings in the cases of Bradbury v. Higginson (1912), 162 Cal. 602, 123 Pac. 797, Oliver v. Loyden (1913), 163 Cal. 124, 124 Pac. 731.

> "Rent does not become payable until it falls due under the lease, though the tenant may have abandoned the premises. The repudiation of the lease by the lessee does not operate to mature further installments of rent."

Now, we should look to the second paragraph of Civil Code §3308, as to the remedies of the landlord. The second paragraph sets forth:

> "The rights of the lessor under such agreement shall be cumulative to all other rights or remedies now or hereafter given to the lessor by law or by the terms of the lease; provided, however, that the election of the lessor to exercise the remedy hereinabove permitted shall be binding upon him and exclude recourse thereafter to any other remedy for rental or charges equivalent to rental or damages for breach of covenant to pay such rent or charges accruing subsequent to the time of such termination." (underlining ours).

The letter of August 5, 1966, directed to the tenant by the landlord stated that:

> "This notice is given to you pursuant to the provisions of paragraph 21 of our lease with you, and you are further reminded that under such paragraph if you do not cure this breach and default within ten days we as landlords shall be entitled to and propose to exercise the various remedies provided for in said paragraph."

In this case ten days would have been up on August 16, 1966, but we have shown that on August 9, 1966, all the locks on the machines were changed by the landlord or someone acting for the landlord, and thus effectually excluding the tenants from the premises. Having elected the one remedy of eviction, the landlord could not thereafter exercise other remedies; particularly where no written notice was given to the tenant after the August 5, 1966 letter (Rep. Tr. pp. 31, 32 & 34). The Code section clearly provides that the election of the lessor to exercise the remedy hereinabove permitted shall be binding upon him, and exclude recourse therefor to any other remedy for rental or charges, and this was the landlord's election and the exclusive exercise of his remedies, as the tenant never was given written notice of the lessors exact intentions.

It cannot be contended that in the face of § 3308 of the Civil Code that the landlord could go on and on, electing,

selecting and exercising various remedies all under a vague illusion to §21 of the lease, and without any notice to the tenant.

The lease having been terminated by the landlord, and the only amount due and owing at that time was $253.09, the appellees here cannot bring themselves within the provisions of the bankruptcy act. It is very clear in this case that the landlord exercised his rights and his remedies as he admits on August 19, 1966, by putting the locks on the outside doors. Then having locked up the machines on the inside on August 9, 1966, so as to preclude the tenant from using the premises, the lessor elected that remedy and not having thereafter given any written notice to the tenant as to what the landlord intended to do for the benefit of the lessee. The landlord must be held to have exercised his remedy by taking possession of the premises and cannot now pursue other remedies.

II

THE RENT OWED WAS LESS THAN THE JURISDICTIONAL AMOUNT.

Appellants and their attorneys are in error in admitting in the answer that they owed three months rent for June, July and August of 1966, actually under the authorities cited below when the lessor acted to deprive the tenants of the use of the premises on August 9, 1966, the rent must be apportioned for

the month of August, 1966, for as is held in the cases of Ohsaki v. Hearn (1927), 85 Cal. App. 199, and Friedman v. Isenbruck (1931), 111 Cal. App. 2d 326 where the Court held:

"Rent can be apportioned when the tenant was evicted through the wrongful act of the lessor."

Therefore, rent was due and payable at approximately $11.66 per day, which would make a total of $104.94 due from August 1 to August 9, 1966, and rent to the date of the eviction would be due and owing to the lessor, and the recomputation shows that only $253.09 was due and owing to the appellees from the appellants at the time the petition was filed. Appellants' answer to petition on page one, paragraph II should be amended to show $253.09 as being owed to the lessor.

III

APPELLEES AS LANDLORDS DID NOT GIVE THE REQUIRED NOTICE TO APPELLANTS

Appellees place great stress on the letters of August 5, 1966, in which the attorneys for appellees wrote to tenants:

"Our client, Madison Way Shopping Center, has addressed to your client, Daniel Sullivan, a notice pursuant to paragraph 21 of the lease in said shopping center between the aforementioned parties."

The letter sets forth the purported delinquency in the rents and the letter from Madison Way Shopping Center says:

> "Your breach consists of your failure to pay rents due on the first day of each month, for the months of June, July and August 1966, this notice is given to you pursuant to the provisions of paragraph 21 of our lease with you and you are further reminded that under such paragraph if you do not cure this breach and default within ten days, we as landlords shall be entitled to and propose to exercise the various remedies provided for in said paragraph."

Based on this vague reference to paragraph 21 and the various remedies, appellees take the position that although appellants were not evicted until August 9, 1966, or August 19, 1966, that this gave the appellees the right to re-let the premises without further notice, to re-let the premises for a different rental, and appellees need not give notice of their intentions to the lessees; also that the new lease may extend beyond the original term without further notice.

Appellants submit that on August 5, when the letters were written, none of these remedies were known or could be known to the appellants' and no effective action was taken until appellees evicted the lessees from the beneficial use of the premises. Thereafter no other notices or letters of any kind were sent to

the lessees by the lessors. To expect the lessees to know which of the various remedies under the vague paragraph 21 of that appellees may elect is an impossible situation, and a tenant has a right to know what the landlord is doing that might result in an obligat ion to pay on the part of the tenant. The two letters of August 5, 1966 Exhibits "A" and "B", are part of Memorandum of Points and Authorities (Cl. Tr. p. 72). At the time the letters were written no action had been taken by the landlord and it was not until August 9th, or August 19, 1966 that the landlord elected one remedy and that was to physically evict the tenant from the premises. No other remedies are available to the lessor under Calif. Civil Code §3308 after exercising his right to evict the tenant.

Appellants contend that they were entitled to written notice from the lessors of their intention to re-let the premises for the benefit of the tenant and for what term and for what amount of rent.

The law is clearly set forth in the cases of DeHart v. Allen (1945), 26 Cal. 2d 829, Kulawitz v. Pacific (1944), 25 Cal. 2d 664, Ace Realty Co. v. Friedman (1951), 106 Cal. App. 2d 805, in which the case is held as follows:

> "A lessor may elect to take possession for the account of the lessee, lease the premises for the account of the lessee, lease the premises for the unexpired term, and sue the tenant for the deficit

for the balance of the term. The lessor must give the tenant information that he is accepting the possession for the lessee's benefit and not his own right and his own benefit."

If the lessor takes possession unqualifiedly, he thereby releases the tenant. The actions of the prepondent herein making the eviction as appellants contend, the actual eviction was made by the landlord either on August 9, 1966 or August 19, 1966, however, the appellants position is that no actual eviction occurred until August 19, 1966. In neither case did the landlord give written notice of his intentions to elect to re-let for the tenants' benefit for the greater term or for a different rent.

At the time the letters of August 5, 1966 were written, the landlord had not elected what remedy he intended to take, and the appellants had the right to believe that the actual eviction by the changing of the locks was the only remedy the landlord had elected, because thereafter he did not receive any other written notices or letters from the lessors (Rep. Tr. p. 34).

The landlord having written a letter on August 5, 1966 did not tell the tenant anything as to the remedies or what position the landlord would take; the lessor went outside the lease as to the special provisions and is bound by the general law.

In Dorosch v. Time Oil Co., (1951), 103 Cal. App. 2d 677, 683, the Court held:

"The landlord must notify the tenant of his intention to re-let for his benefit. If he fails to give notice, his repossession is deemed inconsistent with the lease, and results in the surrender by operation of law, releasing the tenant."

In this case the landlord having failed to give notice of what remedies he intended to exercise under paragraph 21 of the lease, would have to give prompt written notice of his intentions before a re-letting or making a new lease.

The within cause shows a breach of the lease by the landlord in placing locks either on the machinery equipment of the tenant or upon the doors, and the covenant of quiet enjoyment having been breached the lease is terminated.

These cases set forth herein below hold as follows:

"In every lease there is an implied covenant by the lessor of quiet enjoyment and possession during the term." Civil Code (1927)

Baranov v. Scudder (1928), 177 Cal. 458;

Pierce v. Nash (1954), 126 Cal. App. 2d 606, 612, 24 Cal. L. R. 454.

The landlord having failed to notify the tenant in writing after the purported breach of the lease which remedy he would

elect. He cannot accelerate the rent. The case of Goldmining v. Swinerton (1943), 23 Cal. 2d 1932 holds as follows:

> "The landlord cannot, on a theory of anticipatory breach, recover future installments, or the entire balance in advance. If he stands on the lease, and treats it still as in existence, no obligation to pay the rent arises until the installments fall due."

RECAPITULATION

1. Forcible eviction thus terminating the lease.
2. The provision for recovery of the rent is a penalty.
3. The number of creditors were not enough to file the petition.
4. The failure to properly elect remedies.
5. The amount of the total debt is not sufficient for filing the petition.
6. The preparation of the findings of facts and conclusions of law does not constitute adoption of those findings.
7. The Court had no power to find what was the reasonable rental value to the end of the term for this issue was not raised.
8. The findings that the locks were not changed by the lessor is patently absurd.

A lessor had no right to dispossess his lessee forcibly without legal process despite a breach of covenant. Fox v. Brissac, 15 Cal. 223; Eichorn v. Dela Cantera, 117 Cal. App. 2d 50.

This is true though the lease contains a provision for entry in case the rent is not paid. Igauye v. Howard, 114 Cal. App. 2d 122.

The right to repossess should be exercised only where it can be done peaceably and without force or violence. If it cannot, the lessor must resort to the courts. Calidino Hotel Co. v. Bank of America, 31 Cal. App. 2d 295.

To warrant re-entry under a provision for re-entry on default of rent or performance of covenants the lessor must give statutory notice. Lydon v. Beach, 89 Cal. App. 69.

The lessor must not use forcible means to effect an entry. Igauye v. Howard, 114 Cal. App. 2d 122.

A lease provision that authorizes the lessor on default to terminate the lease and re-enter the premises and at the same time to sue for unpaid rent reserved for the entire term has been held to constitute a provision for a penalty and as such to be unenforceable. Ricker v. Rombough, 120 Cal. App. 2d Supp. 912.

Among acts held to constitute an eviction (1) the taking of possession without the lessee's consent, (2) reletting to another; Boswell v. Merrill, 128 Cal. App. 476; (3) Breaking

locks on gates and doors, Saferian v. Baer, 105 Cal. App. 238.

CONCLUSION

The appellees in this case, one creditor with only a claim for $253.09, do not comply with the Bankruptcy Act so as to give the referee the authority to adjudicate the appellants as bankrupts.

Respectfully submitted,

COURTNEY & COURTNEY

By: /s/ Norman P. Courtney

Attorneys for Appellants

CERTIFICATE

I certify, that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Norman P. Courtney

NORMAN P. COURTNEY